Petition

81-1867

No.

Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1981

BENHARDT COHEN - - - - - Petitioner

versus

KENTUCKY BAR ASSOCIATION - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Henry Armstrong Triplett

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QUESTION FOR REVIEW

Where a State's Lawyer Disciplinary Code does not require the lawyer to be told the precise canon of ethics or disciplinary rule the lawyer is alleged to have violated and where the highest court of a state retains unto itself fact-finding powers without seeing or hearing the lawyer charged or the witnesses and where the record is devoid of evidence sustaining one of the charges, does such process violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States?

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SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

BENHARDT COHEN - - - - - *Petitioner*

v.

KENTUCKY BAR ASSOCIATION - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Petitioner, Benhardt Cohen, respectfully prays that a Writ of Certiorari issue to review the correctness of the decision of the Supreme Court of Kentucky (Opinion and Final Order of Supreme Court of Kentucky, Appendix 1).

OPINIONS AND ORDERS BELOW

The Opinion of the Supreme Court of Kentucky is reported in *K.B.A.* v. *Cohen,* Ky., 625 S. W. 2d 573 (1981) (Appendix 1). An Order denying a Petition for Rehearing was entered January 12, 1981 (Appendix 2), and an Order Granting a Stay of Enforcement of the Judgment pending this petition was entered January 18, 1982 (Appendix 6).

JURISDICTION

The final Judgment of the Supreme Court of Kentucky was entered on the 18th day of January, 1982. This Petition for Writ of Certiorari was filed within ninety (90) days thereof and the Court's jurisdiction is invoked under 28 U.S.C. 1257, Section 3.

APPLICABLE STATUTES AND CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides inter alia:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Petitioner, Benhardt Cohen, who was at all times material herein, a duly licensed and regularly practicing attorney in Louisville, Jefferson County, Kentucky, was suspended from the practice of law for a period of two (2) years by the Supreme Court of Kentucky (Appendix 1).

Petitioner contended below and will contend here that Kentucky's procedure for disciplining lawyers is constitutionally deficient and void.

Petitioner's claims against the Respondent will include averments of denial of due process of law and denial of equal protection of the law.

The Appendix includes salient portions of Kentucky's Lawyer Disciplinary Rule (Appendix 7).

Petitioner was charged by the Kentucky Bar Association with unprofessional conduct, but the charge filed against the Petitioner did not tell him the portion of the Code of Professional Responsibility he was alleged to have violated (Appendix 3). An Answer was filed to this charge and this defense was asserted (Appendix 4).

Thereafter, the evidence in the case was heard by a Trial Commissioner who made certain findings of fact. These findings are advisory only (Appendix 1).

Thereafter, Petitioner's case was submitted to the Board of Governors of the Kentucky Bar Association and this body considered the record and the briefs of counsel. Petitioner was not permitted to appear before this Board and give evidence or be seen to speak on the issues of guilt and punishment. The Board of Governors found the Petitioner guilty of the charges and recommended a two (2) year suspension (Appendix 1).

Thereafter, by Notice of Review, the Supreme Court of Kentucky considered Petitioner's case. A Motion for Oral Argument was denied (Appendix 5) and the Supreme Court ordered Petitioner suspended from the practice of law for a period of two (2) years. The Supreme Court of Kentucky, in its Opinion, said:

> "The recommendation by the Board of Governors is advisory only. This means that this court must be the judge of the factual as well as the legal issues and of the final action to be taken. Kentucky State Bar Association v. Stivers, Ky., 475 S. W. 2d 900 (1972)."

It did not deal with some very contested issues of fact.

It is Petitioner's contention that where lawyer disciplinary rules do not require a charge to contain the particular canon or disciplinary rule the lawyer is alleged to have violated, the rule violates the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Petitioner further contends that where the rule and procedure permits the Supreme Court of Kentucky to make the final judgment in a lawyer disciplinary case without hearing the evidence in person and seeing and hearing Petitioner in person violates the due process clause and the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Petitioner will further contend in chief in the event this Petition is granted that there was an absence of evidence as to his guilt in at least one of the charges and this violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

On timely motion, the Supreme Court of Kentucky granted Petitioner's Motion for a Stay of the Enforcement of the suspension, pending action by this Court and a Motion for Stay accompanies this Petition.

REASONS FOR GRANTING THE WRIT

There are several good and compelling reasons for granting the Writ. As background, we would say the American Bar Association's Committee on Professional Responsibility has recommended a new code of Professional Responsibility. The drafts that we have read do not include or address disciplinary process. The procedures for lawyer discipline vary greatly among the states. Some states have a committee or commission which hears the evidence and makes a determination of guilt and punishment. A Right of Review is generally permitted to the highest court of the state or commonwealth and the findings of the commission are given the same weight an appellate court traditionally gives the factual findings of a lower court or tribunal and these findings may not be set aside unless they are clearly erroneous. Other states have provisions similar to Kentucky's wherein everything that is done before the case gets to the highest court is advisory only. A classic example of this is the case of *Kentucky Bar Association* v. *Heavrin,* Ky., 573 S. W. 2d 916, where the trial committee who actually saw and heard Heavrin dismissed every count and this was reversed by the Board of Governors who never saw Heavrin and affirmed by the Supreme Court of Kentucky. Chief Justice Palmore's dissent in the Heavrin case is particularly germane and appropriate. Under Kentucky procedure, a lawyer charged with unprofessional conduct appears before a single person trial commissioner

whose sole role is to make a finding of fact on the averments contained in the charge. This person sees the lawyer but this person is powerless to make any recommendation about punishment. By rule, the finding is advisory. Thereafter, the case is submitted to the Board of Governers and this Board meets secretly and the Board determines guilt or innocence and recommends punishment and punishment can range from a private admonition to permanent disbarment. If the punishment involves a public reprimand, a suspension, or permanent disbarment, the case is then sent to the Supreme Court of Kentucky. If no notice of review is filed the punishment will stand or the court, on its own motion, may require the case to be reviewed in chief and increase or modify the punishment. The lawyer charged has no right to appear in person before the Court and give evidence, either on guilt or punishment, and, in this case, a motion for an oral argument was denied (Appendix 5). Therefore, the very body which suspended the Respondent from the practice of law for a period of two (2) years never saw or heard the Respondent in person.

One of the charges involved a failure to heed certain admonitions made to the Respondent by the Bankruptcy Judge. It is Petitioner's contention here, as it was below, that there was absolutely no evidence whatsoever to sustain this charge nor was he ever told what precise canon or disciplinary rule he violated in this respect. There is no evidence of record saying why Petitioner was suspended from the practice of law for a period of two (2) years and there is nothing

in the Code that sets forth any objective standards for punishment. In *Thompson* v. *City of Louisville,* 362 U. S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624, this Court said:

> "Just as conviction upon a charge not made would be sheer denial of due process so is it a violation of due process to convict and punish a man without evidence of his guilt."

Here Petitioner was not told the rule he was claimed to have violated, there was an absence of evidence on one charge and there was no stated basis for the punishment, either by the Board of Governors, by the Supreme Court of Kentucky, nor was any basis set forth in the rules governing discipline of lawyers. *In Re Ruffalo,* 390 U. S. 544, 21 L. Ed. 2d 117, 88 S. Ct. 1222, says that these proceedings are quasi criminal in nature. This makes *Thompson* v. *City of Louisville, supra,* applicable and, of course, the result of the proceedings is that Petitioner has lost a hard earned license for a period of two (2) years. This is no small matter.

Petitioner contends that if the Supreme Court of Kentucky is going to retain unto itself the ultimate power to resolve not only legal issues but factual issues, it must hear the evidence itself.

There have been several cases relating to this point. These cases arise from criminal proceedings. In *Banks* v. *United States,* 614 F. 2d 95 (CA 6 KY), it was held a federal judge could not delegate a probation revocation hearing to the United States Magistrate. It was

said, "A cold record is no substitute for personal observation."

One of the several rationale of *Banks* is that Congress was careful to retain fact-finding functions in district judges. Cited in *Banks* in a footnote is *Wingo* v. *Wedding,* 418 U. S. 461, 94 S. Ct. 2842, 41 L. Ed. 2d 879 (1974). The case arose from the Western District of Kentucky and basically held a U.S. Magistrate had no authority at that time to conduct an evidentiary hearing in a federal habeas corpus case. The proceedings here are quasi criminal, as stated *In Re Ruffalo, supra,* and we suppose quasi criminal is something between pure civil and pure criminal. In *Banks,* and at the time of *Banks,* Congress had not authorized the federal district judge to delegate his authority to a magistrate or anyone else to make evidentiary findings in a habeas corpus proceeding. The Supreme Court of Kentucky has not delegated its authority to the Board of Governors, a trial commissioner, or anyone else to make evidentiary findings which will have some legal significance or weight. The Supreme Court of Kentucky has not done this and as it retains absolute authority to make its own findings, it causes the procedure to be constitutionally deficient as held in *Banks* v. *United States* and *Wingo* v. *Wedding, supra.* Traditionally, Courts, in providing fact-finding powers, say that facts found by the body below will stand unless they are clearly erroneous or not supported by the record. Such is not the case here as we understand the current process. If there had been no evidence that Respondent was ever in the Bankruptcy Court and

forty bishops said he was not, the Supreme Court of Kentucky still could have held that he was.

A lawyer in a proceeding which will determine the lawyer's right to practice his profession is entitled to due process of law and a state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the due process or equal protection clause of the Fourteenth Amendment. *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 1 L. Ed. 2d 796, 77 S. Ct. 752. *Konigsberg* v. *State Bar of California,* 353 U. S. 252, 1 L. Ed. 2d 810, 77 S. Ct. 722.

If there is to be a new code of professional responsibility and Petitioner assumes most states will adopt it, then there should be some early understanding about the process permitted for disciplining lawyers. If not, this Court will continue to be plagued by a plethora of petitions for Writs of Certiorari and this case brings into sharp focus the delineation between procedures that will be permitted and those that will be forbidden. At least, and in the event this petition is granted, the court should hold that a lawyer must be told the precise canon or rule the lawyer is charged with violating, that the process involved must involve some meaningful or significant hearing procedure whereby the person or body hearing the case can make some binding or final ajudication of the facts upon which the lawyer may rely and the process should insist that there be specific findings of fact on each of the elements necessary to sustain the charge and that there should be some objective standard for punishment.

WHEREFORE, the Petitioner, Benhardt Cohen, respectfully prays:

1. That the Petition for Writ of Certiorari be granted.

2. That the Stay of Enforcement of the Final Judgment by the Supreme Court of Kentucky be continued until final order of this Court.

3. That he recover all other and proper relief in the premises, as the circumstances warrant.

Respectfully submitted,

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(502) 583-5581

Counsel for Petitioner

CERTIFICATION

It is certified that three (3) copies of this Petition for Writ of Certiorari and the attached Appendix were mailed by first class mail, postage prepaid, this 8th day of April, 1982, to Hon. Leslie G. Whitmer, Director, and Michael Hooper, Assistant Director, Kentucky Bar Association, West Main at Kentucky River, Frankfort, Kentucky 40601, Counsel for Respondent.

Henry Armstrong Triplett

HENRY ARMSTRONG TRIPLETT

Counsel for Petitioner

Appendix

APPENDIX 1

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

BENHARDT S. COHEN - - - - - *Respondent*

OPINION—November 3, 1981

Rehearing Denied January 12, 1982.

On recommendation of the Board of Governors of the State Bar Association in disciplinary proceeding, the Supreme Court held that alteration of dates of depositions and affidavits in two divorce cases, violation of bankruptcy rules that filing fees be paid before attorney may be paid, and false statements in bankruptcy petitions as to amount of attorney fee paid to attorney warrants two-year suspension from practice of law.

Suspension ordered.

1. Attorney and Client—Key 54

Recommendation by Board of Governors of State Bar Association in disciplinary proceeding is advisory only; the Supreme Court must be judge of factual as well as legal issues and of final action to be taken.

2. Attorney and Client—Key 58

Alteration of dates of depositions and affidavits in two divorce cases, violation of bankruptcy rules that filing fees be paid before attorney may be paid, and false statements

in bankruptcy petitions as to amount of attorney fee paid to attorney warrants two-year suspension from practice of law.

Leslie G. Whitmer, Director, Michael M. Hooper, Assistant Director, Kentucky Bar Association, Frankfort, for complainant.

Henry A. Triplett, Louisville, for respondent.

OPINION OF THE COURT

This is a disciplinary proceeding in which the Board of Governors of the Kentucky Bar Association found respondent guilty of unprofessional conduct calculated to bring the bench and bar into disrepute. The Board recommended that respondent be suspended from the practice of law for two years.

Two counts of the first charge state that respondent after taking depositions in two divorce cases later altered the dates of the depositions and the affidavits to a later date in order to comply with KRS 403.044 and filed these altered and falsified depositions with the clerk of the Jefferson Circuit Court.

Count I of the second charge states that respondent in fifty-eight bankruptcy cases violated the Rules of Bankruptcy that filing fees must be paid before the attorney may be paid, that respondent was repeatedly advised of the rule by the bankruptcy judge and continued to violate the rule.

Count II of the second charge stated that respondent on two separate occasions in bankruptcy petitions falsely stated to the court the amount of attorney fee paid to him in a document styled "Statement of Attorney for Bankrupt".

The Board of Governors of the Kentucky Bar Association found respondent guilty of all charges and recommended a two-year suspension from the practice of law.

[1] The recommendation by the Board of Governors is advisory only. This means that this court must be the judge of the factual as well as the legal issues and of the final action to be taken. *Kentucky State Bar Association* v. *Stivers*, Ky., 475 S. W. 2d 900 (1972).

[2] We have reviewed the record and are of the opinion that the conduct of respondent displayed here, particularly the falsification of the depositions, is so reprehensible as to bring the bench and bar into disrepute. Thus we adopt the recommendation of the Board of Governors.

Honesty, high ethical standards, and good moral character are essential attributes to the lawyer throughout his professional life, and when he exhibited a lack of these it is incumbent upon the Bar Association and this court to take appropriate action.

Respondent's argument of unconstitutional vagueness has been consistently rejected by this court and requires no further comment.

Accordingly respondent is suspended from the practice of law in this Commonwealth for two years and is directed to pay the costs of this action.

All concur.

APPENDIX 2

SUPREME COURT OF KENTUCKY

81-SC-372-KB

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v. *In Supreme Court*

BENHARDT S. COHEN - - - - - *Respondent*

ORDER DENYING PETITION FOR REHEARING

Respondent's petition for rehearing is denied.

Palmore, C.J., Aker, Clayton, Stephens, Stephenson and Sternberg, J.J., concur.

ENTERED January 12, 1982.

(s) John S. Palmore
Chief Justice

APPENDIX 3

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

BENHARDT S. COHEN - - - - - *Respondent*

CHARGE

Comes now the Kentucky Bar Association, by and through its Inquiry Tribunal, and states that Benhardt S. Cohen, whose last known address is 310 West Liberty Street, Suite 715, Louisville, Kentucky 40202, a member of said association, did engage in the following unethical and unprofessional conduct:

I

On or about July 16, 1979, respondent, acting as attorney for Cheryl Ostria, caused to be prepared and filed with the Clerk of the Jefferson Circuit Court a petition for dissolution of marriage styled Cheryl Lynn Ostria v. Jorge M. Ostria, No. 79-CI-06547. In said petition for dissolution of marriage respondent stated that the parties had an infant child born of their marraige named Antonio Martin Ostria. On or about July 16, 1979, respondent caused to be filed with the Clerk of the Jefferson Circuit Court an entry of appearance and waiver which had been executed by Jorge Ostria and which had been prepared by respondent. As an attorney respondent either knew or should have known that pursuant to KRS 403.044 no testimony could be

taken in the divorce action until sixty days had elapsed. On or about September 7, 1979, respondent sent Cheryl Ostria and her sister, Pamela J. Woolsey, to a notary public named Beverly Ann Raisor for the purpose of taking evidence from them to be used in the divorce action. On or about September 7, 1979, Cheryl Ostria and Pamela Woolsey appeared before Beverly Raisor and gave their depositions upon written questions. Beverly Raisor executed a notary certificate which certified that Cheryl Ostria and Pamela Woolsey had appeared before her in person on September 7, 1979, and had sworn to and signed their depositions. On the same day Cheryl Ostria executed a general and military affidavit which was witnessed and notarized by Beverly Raisor as having been subscribed and sworn to before her by Cheryl Ostria on September 7, 1979. Said depositions and said affidavit were filed with the Clerk of the Jefferson Circuit Court on September 12, 1979, but were rejected by the court on the ground that the proof had been taken prior to the expiration of the sixty day waiting period provided in KRS 403.044.

On or about November 1, 1979, respondent approached Beverly Raisor and they discussed respondent's need to submit evidence to the circuit court on behalf of his client in order to obtain a judgment of divorce. During the course of said conversation it was agreed and understood between respondent and Beverly Raisor that Beverly Raisor would alter and falsify photostatic copies of the aforementioned depositions of Cheryl Ostria and Pamela Woolsey and the aforementioned affidavit of Cheryl Ostria to make it appear that said documents had been executed and notarized on September 28, 1979. On or about November 1, 1979, Beverly Raisor, acting with respondent's knowledge and consent, altered and falsified said depositions and said affidavit by changing the dates on said documents to make it appear that they had been executed and notarized

on September 28, 1979, instead of September 7, 1979. The altered and falsified copies of said documents were filed with the Clerk of the Jefferson Circuit Court on or about November 1, 1979, with respondent's knowledge and consent.

II

On or about August 27, 1979, respondent, acting as attorney for Joseph Coyle, caused to be prepared and filed with the Clerk of the Jefferson Circuit Court a petition for dissolution of marriage styled Joseph L. Coyle v. Kathleen Ann Coyle, No. 79-CI-08006. In said petition for dissolution of marriage respondent stated that the parties had an infant child born of their marriage named Julie Ann Coyle. On or about August 27, 1979, respondent caused to be filed with the Clerk of the Jefferson Circuit Court an entry of appearance and waiver which had been executed by Kathleen Coyle and which had been prepared by respondent. As an attorney respondent either knew or should have known that pursuant to KRS 403.044 no testimony could be taken in the divorce action until sixty days had elapsed. On or about September 23, 1979, respondent sent Joseph Coyle and his friend, Murl Coots, to a notary public named Beverly Ann Raisor for the purpose of taking evidence from them to be used in the divorce action. On or about September 23, 1979, Joseph Coyle and Murl Coots appeared before Beverly Raisor and gave their depositions upon written questions. Beverly Raisor executed a notary certificate which certified that Joseph Coyle and Murl Coots had appeared before her in person on September 23, 1979, and had sworn to and signed their depositions. On the same day Joseph Coyle executed a general and military affidavit which was witnessed and notarized by Beverly Raisor as having been subscribed and sworn to before her

by Joseph Coyle an September 23, 1979. Said depositions and said affidavit were filed with the Clerk of the Jefferson Circuit Court on October 15, 1979, but were rejected on the ground that the proof had been taken prior to the expiration of the sixty day waiting period provided in KRS 403.044.

On or about October 28, 1979, either respondent or a person employed by respondent acting with respondent's knowledge and consent, altered and falsified photostatic copies of the aforementioned depositions of Joseph Coyle and Murl Coots and the aforementioned affidavit of Joseph Coyle to make it appear that said documents had been executed and notarized on October 28, 1979, instead of September 23, 1979. The altered and falsified copies of said documents were filed with the Clerk of the Jefferson Circuit Court on or about November 1, 1979, with respondent's knowledge and consent. The dates on the original depositions and the affidavit were altered and falsified by respond without the knowledge and consent of the notary public, Beverly Raisor.

WHEREFORE, complainant charges that such actions by respondent constitute unethical and unprofessional conduct tending to bring the bench and bar into disrepute; and that discipline of an appropriate degree should be administered to respondent in accordance with SCR 3.370 and SCR 3.380.

Kentucky Bar Association
William P. Donan, Chairman
Inquiry Tribunal

Attest:

Leslie G. Whitmer, Director
Kentucky Bar Association

APPENDIX 4

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

BENHARDT S. COHEN - - - - - *Respondent*

ANSWER

The respondent, Benhardt S. Cohen, for answer to the charge (sic) or charges made by the Kentucky Bar Association, says:

(1) That the charge fails to state facts which constitute unethical and unprofessional conduct and further fails to tell respondent which, if any, of the canons contained in the Code of Professional Responsibility he is averred to have violated.

(2) That all averments not expressly admitted are denied.

(3) That the procedure for disciplining a lawyer charged with and found to have engaged in unethical and unprofessional conduct is unconstitutional, void and violates respondent's rights to due process of law and equal protection of the law as guaranteed by the State and Federal Constitutions and further permits the exercise of arbitrary power which is prohibited by Section 2 of the Bill of Rights of the Constitution of Kentucky, in that:

(a) It discriminates between respondent and other civil litigants because it does not grant him the same rights as other civil litigants have.

(b) It denies him discovery as permitted by the Rules of Civil Procedure of the Commonwealth of Kentucky.

(c) It does not state the standard of proof necessary to establish a fact.

(d) It does not provide a hearing before the board, body, court or tribunal who ultimately decides this case.

(e) It denies him access to the exculpatory evidence which may have been uncovered in the investigation by the Kentucky Bar Association.

(f) That it denies him the right to confront those persons who have leveled charges against him.

(g) It permits secret proceedings without a public hearing.

(h) It permits the finding of charges without advising respondent the particular canon of the Code of Professional Responsibility that it is claimed he violated.

(i) It denies him a right to a trial by jury.

(j) It does not set forth a standard of sanctions and permits different persons found guilty of identical violations to be treated differently.

(k) It permits the complainant to be both the prosecutor and the judge.

(l) It does not require the person or persons who ultimately determine respondent's guilt, innocence and punishment to hear the respondent in person and his witnesses and to make an independent evaluation of their credibility.

(m) That the canons of ethics included in the Code of Professional Responsibility are void for vagueness.

(4) The assertion of other defenses herein does not waive previous defenses.

(5) Respondent admits the first two sentences of Charge 1, denies the third sentence, admits the fourth sentence, admits the fifth sentence, admits the sixth sentence, admits the seventh sentence, and admits the eighth sentence. Re-

spondent admits the ninth sentence, denies the tenth sentence, denies the eleventh sentence, and denies the twelfth sentence. Respondent admits the first three sentences of Charge II, denies the fourth sentence, admits the fifth, sixth, seventh, eighth and ninth sentences, denies the tenth, eleventh and twelfth sentences. Affirmatively, respondent says that respondents in both dissolution cases had executed a waiver of all future proceedings and respondent avers that the original proof conferred jurisdiction on the court to enter a decree of dissolution.

WHEREFORE, the respondent demands:

(1) That the charges be dismissed.

(2) That he be granted discovery as permitted all other litigants under the Kentucky Rules of Civil Procedure.

(3) That he be granted a trial by jury.

(4) That all persons connected with the Kentucky Bar Association, complainant herein, be disqualified from considering respondent's case.

(5) That he be supplied with true copies of the entire investigative file and all other papers relative to his case.

(6) That he recover all other and proper relief in the premises as the circumstances warrant.

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APPENDIX 5

SUPREME COURT OF KENTUCKY

81-SC-372-KB

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v. *In Supreme Court*

BENHARDT S. COHEN - - - - - *Respondent*

ORDER

The respondent's motion for oral argument is denied.
All concur.
Entered September 1, 1981.

(s) John S. Palmore
Chief Justice

APPENDIX 6

SUPREME COURT OF KENTUCKY

81-SC-372-KB

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v. *In Supreme Court*

BENHARDT S. COHEN - - - - - *Respondent*

ORDER GRANTING STAY OF EXECUTION AND ENFORCEMENT OF OPINION

On motion of the respondent a stay of execution and enforcement of this Court's opinion of November 3, 1981, which became final January 12, 1982, is granted for a period to and including April 12, 1982, in order that respondent may make application to the Supreme Court of the United States for a writ of certiorari.

Any additional request for stay deemed necessary should be addressed to the Supreme Court of the United States.

ENTERED January 18, 1982.

(s) John S. Palmore
Chief Justice

APPENDIX 7

RULES OF SUPREME COURT, THE PRACTICE OF LAW

Rule 3.160. Initiation of Disciplinary Cases

(1) Any complaint against an attorney for unprofessional conduct shall be reduced to a sworn written statement and shall be filed with the Director who shall promptly notify the attorney by certified mail of the complaint and inform him that he has fifteen days to acknowledge receipt of the complaint or respond to the merits.

(2) Notwithstanding the provisions of paragraph (1), when it comes to the attention of the tribunal from any source that an attorney may have engaged in unprofessional conduct, the tribunal may initiate and conduct an investigation, and if it believes from its investigation that there is sufficient evidence to justify its filing a complaint against the attorney it may file such a complaint.

(3) Notwithstanding the provisions of paragraph (1), if the Director deems any written complaint against a member frivolous on its face, he may submit it to the chairman of the Inquiry Tribunal who may decline, without investigation, to entertain it and may authorize the Director to return the complaint to the complaining party with a letter of explanation.

(4) Neither the Kentucky Bar Association nor any member thereof shall be liable to any member of the Bar nor to any other person charged or investigated by said Association or its officers for any damages incident to such investigation or any complaint, charge, prosecution, proceeding or trial.

Rule 3.190. Charges; Form; by Whom and Where Filed

If the Tribunal determines, by a majority vote, that a charge should be filed, it shall prepare such charge stating the name and present, or last known, address of the attorney and facts alleged to constitute unprofessional conduct. The charge shall be signed by a member of the Tribunal and filed in the office of the Director.

Rule 3.230 Procedure When Answer Raises Issues of Fact

If the answer raises any issue of fact the Inquiry Tribunal shall notify the Chairman in order that he may appoint an attorney to represent the Association and a Trial Commissioner, a member of the House possessing the qualifications of a circuit judge and be so commissioned by the Chief Justice. The Trial Commissioner shall reside in a different Supreme Court district from that of the respondent. The Director shall immediately notify him of his appointment and furnish him with a copy of the pleadings.

Rule 3.360 Trial Commissioner to File Report With Board

When a disciplinary proceeding has been finally submitted, the Trial Commissioner shall promptly file with the Board within thirty (30) days after the transcript of evidence is filed by the reporter with the Director the entire transcript of the proceeding, the transcript of testimony together with such papers as may have been filed and a written report in the nature of findings of fact relating to guilt or innocence, which shall contain a concise statement of:

(a) the charges made against and the defense offered by the respondent;

(b) the proceedings had;

(c) the facts which the Commissioner deems proven by substantial evidence.

The Trial Commissioner's report shall constitute a part of the record in the case. The report shall be advisory. Within forty (40) days after the filing of the report with the Director, each party shall file a brief simultaneously with the Director and no reply briefs shall be permitted.

Amended effective January 1, 1978.

Rule 3.370 Board's Action on Trial Commissioner's Report and Procedure in the Court

(1) Upon receipt of the report of the Trial Commissioner, the Board shall promptly consider and act upon the entire record. Only the President, the President-Elect, the Vice-President and the fourteen duly elected members of the Board from their respective Supreme Court districts shall be eligible to be present, participate in, and vote on any disciplinary case. Any member who has participated

in any phase of a disciplinary case submitted to the Board under this Rule, or has been challenged on grounds sufficient to disqualify a circuit judge shall be disqualified; and the Chief Justice shall appoint a member to consider and act on the case.

(2) Nine of those qualified to sit in a disciplinary matter must be present to constitute a quorum for consideration of such matters.

(3) The Board shall decide, by a roll call vote, whether the respondent is guilty or not guilty. If the respondent be found guilty, the Board shall then decide by a roll call vote, the disciplinary action. Both the findings and any disciplinary action must be agreed upon by 9 or ¾ of the members of the Board present and voting in the proceedings, whichever is less. The result of each of the two votes shall be recorded in the Board's minutes, together with decisions of the Board giving its findings of fact and conclusions of law and reasons therefor as stated in paragraph (4) to this Rule. The President shall sign and file with the Director an order setting forth the action and decision of the Board, and the Director shall mail copies of such order and decision together with a copy of the Trial Commissioner's report, to the parties or their counsel and to each member of the Tribunal.

(4) The Board will, in its decision, state wherein it differs with the findings of fact of the Trial Commissioner, and will state the discipline, if any.

(5) The entire record, together with a certified bill for costs and expenses incurred in the investigation preliminary to, and in the conduct of, the proceedings, shall be filed with the Clerk by the Director.

(6) The respondent may file a notice for the Court to review the Board's decision within thirty (30) days after the Board's decision is filed with the Clerk stating reasons for review accompanied by a brief supporting his position

on the merits of the case. The Director may file a brief within thirty (30) days thereafter in support of the Board's decision. Before the notice for review can be filed, the respondent shall furnish a bond with surety acceptable to the Clerk, conditioned that if the principal in the bond be disciplined by the Court, he will promptly pay all costs incurred in the proceeding including those certified under Rule 3.370. If he files his response *in forma pauperis*, no bond shall be required.

(7) The Court may within sixty (60) days of the filing of the Board's decision notify both the Director and respondent that it will review the Board's decision. If the Court so acts, the Director and respondent may each file briefs within forty (40) days with no right to file reply briefs unless by order of the Court whereupon the case shall stand submitted. Thereafter, the Court shall enter such orders or opinion as it deems appropriate on the entire record.

(8) If the respondent does not file a notice of review or the Court does not notify the parties of its review under paragraph (7) of this Rule, the Court shall enter an order adopting the decision of the Board relating to all matters.

(9) When the respondent is proceeded against by warning order, the notice in paragraph (3) and paragraph (7) of this Rule shall be deemed to have been served thirty (30) days after the date of the making of the warning order.

(Amended effective January 1, 1978; July 1, 1979.)

Rule 3.380 Degrees of Discipline

Upon finding by the Board or Court under the provisions of Rule 3.370 of guilt or unprofessional conduct, discipline may be administered by way of admonition, private reprimand, public reprimand, censure, suspension from practice or disbarment. If a private reprimand is issued, it shall not be made public and shall be transmitted only to

the respondent, or his attorney, and to the attorney for the complainant, and the Court shall order the record sealed subject to reopening only on order of the Court.

Amended effective January 1, 1978.

APPENDIX 8

STIPULATION AS TO PETITIONER'S REPUTATION

III

This stipulation relates to the Deitz charges and to the Bartholomew charges:

(1) The respondent's general reputation is good, and none of the actions which are the subject of either charge were done for personal gain. That none of the clients have complained.

Agreed To:

(s) Frank Trusty II
Attorney for Kentucky Bar Association

(s) Michael Hooper
Assistant Director, Kentucky Bar Association

(s) Benhardt S. Cohen
Respondent

(s) Henry A. Triplett
Attorney for Respondent

Date: 1-15-81

Opposition

Office - Supreme Court, U.S.
FILED
MAY 6 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1867

A-852

SUPREME COURT OF THE UNITED STATES

October Term, 1981

BENHARDT COHEN .....**Petitioner**

versus

KENTUCKY BAR ASSOCIATION .....**Respondent**

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

LESLIE G. WHITMER
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QUESTIONS FOR REVIEW

1. Whether the disciplinary proceedings of the Supreme Court of Kentucky and the Kentucky Bar Association, an agent of the Court, were conducted in such a way as to deny the petitioner procedural and substantive due process of law and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States.

2. Whether the evidence supports the findings and judgment of the Supreme Court of Kentucky.

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SUPREME COURT OF THE UNITED STATES

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No. 81-1867
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BENHARDT COHEN ..... **Petitioner**

versus

KENTUCKY BAR ASSOCIATION ..... **Respondent**

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Kentucky (Petition, Appendix I) is reported at 625 S.W. 2d 573 (1981).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

APPLICABLE CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment XIV:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of Kentucky, Section 116:

"The Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, rules for the appointment of commissioners and other court personnel, and rules of practice and procedure for the Court of Justice. The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar."

APPLICABLE COURT RULES

Supreme Court of the United States:

Rule 8. Disbarment.

Where it is shown to the Court that any member of its Bar has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, such member forthwith may be suspended from practice before this Court. Such member thereupon will be afforded the opportunity to show good cause, within 40 days, why disbarment should not be effectuated. Upon his response, or upon the expiration of the 40 days if no response is made, the Court will enter an appropriate order.

Rule 17. Considerations Governing Review on Certiorari.

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted

only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and by any other court whose judgments are reviewable of law on writ of certiorari.

Supreme Court of Kentucky:

Rule 3.300 Rights of Respondent Against Whom a Charge Has Been Filed.

The respondent against whom a charge has been filed shall have the right to be represented by counsel. If the Tribunal finds the answer to the charge raises issues of fact, the respondent shall be entitled to a hearing before a Trial Commissioner. He shall have all the rights secured to a party by the Rules of Civil Procedure with respect to the introduction of evidence, the right to compel the attendance of witnesses; and the production of books, papers and documents or other writings except those contained in the investigative file of the association. He shall have the right to an oral argument or to file a brief before the Trial Commissioner. He shall be afforded a full opportunity to remain silent, to defend himself by the introduction of evidence and to cross-examine witnesses called against him. If the respondent be unable to employ counsel, the Chairman, upon written request in affidavit form, made within twenty days after service of the charges, shall appoint counsel for the respondent.

Rule 3.330 Order of Proceedings and Burden of Proof.

The Trial Commissioner shall determine and regulate the order of proceedings at the hearing. Upon the application of a party or upon direction of the Trial Commissioner the Director shall issue subpoenas for the attendance of witnesses or the production of evidence. The burden of proof shall rest upon the Association in a disciplinary proceeding and the facts must be proven by substantial evidence.

In reinstatement hearings the burden shall rest upon the applicant. Before submission the Trial Commissioner may direct such oral argument as it deems appropriate and receive briefs from all parties on such terms as it may impose."

Rule 3.370 Board's Action on Trial Commissioner's Report and Procedure in the Court.

(1) Upon receipt of the report of the Trial Commissioner, the Board shall promptly consider and act upon the entire record. Only the President, the President-Elect, the Vice-President and the fourteen duly elected members of the Board from their respective Supreme Court districts shall be eligible to be present, participate in, and vote on any disciplinary case. Any member who has participated in any phase of a disciplinary case submitted to the Board under this Rule, or has been challenged on grounds sufficient to disqualify a circuit judge shall be disqualified; and the Chief Justice shall appoint a member to consider and act on the case.

(2) Nine of those qualified to sit in a disciplinary matter must be present to constitute a quorum for consideration of such matters.

(3) The Board shall decide, by a roll call vote, whether the respondent is guilty or not guilty. If the respondent be found guilty, the Board shall then decide by a roll call vote the disciplinary action. Both the findings and any disciplinary action must be agreed upon by 9 or ¾ of the members of the Board present and voting in the proceedings, whichever is less. The result of each of the two votes shall be recorded in the Board's minutes and in a written decision of the Board giving its findings of fact and

conclusions of law and reasons therefor as stated in paragraph (4) of this Rule. The President shall sign and file with the Director an order setting forth the action and decision of the Board, and the Director shall mail copies of such order and decision together with a copy of the Trial Commissioner's report, to the respondent and his counsel and to each member of the Tribunal.

(4) The Board will, in its decision, state wherein it differs with the findings of fact of the Trial Commissioner, and will state the degree of discipline, if any.

(5) The entire record, together with a certified bill for costs and expenses incurred in the investigation preliminary to, and in the conduct of, the proceedings, shall be filed with the Clerk by the Director.

(6) The respondent may file a notice for the Court to review the Board's decision within thirty (30) days after the Board's decision is filed with the Clerk stating reasons for review accompanied by a brief supporting his position on the merits of the case. The Director may file a brief within thirty (30) days thereafter in support of the Board's decision. Before the notice for review can be filed, the respondent shall furnish a bond with surety acceptable to the Clerk, conditioned that if the principal in the bond be disciplined by the Court, he will promptly pay all costs incurred in the proceeding including those certified under Rule 3.370. If he files his response in forma pauperis, no bond shall be required.

(7) The Court may within sixty (60) days of the filing of the Board's decision notify both the Director and the respondent that it will review the Board's

decision. If the Court so acts, the Director and respondent may each file briefs within forty (40) days with no right to file reply briefs unless by order of the Court whereupon the case shall stand submitted. Thereafter, the Court shall enter such orders or opinion as it deems appropriate on the entire record.

(8) If the respondent does not file a notice of review or the Court does not notify the parties of its review under paragraph (7) of this Rule, the Court shall enter an order adopting the decision of the Board relating to all matters.

(9) When the respondent is proceeded against by warning order, the notice in paragraph (3) and paragraph (7) of this Rule shall be deemed to have been thirty (30) days after the date of the making of the warning order.

COUNTERSTATEMENT OF THE CASE

On October 30, 1979, Federal Bankruptcy Judge Merritt S. Deitz, Jr., filed a complaint against Petitioner with Respondent herein alleging the facts set forth in a charge filed by Respondent's Inquiry Tribunal on July 7, 1980. (Appendix 1). On November 30, 1979, the Louisville Bar Association's Committee on Professional Responsibility filed a complaint with Respondent against Petitioner resulting from information received from a Deputy Jefferson County Circuit Court Commissioner alleging the facts set forth in a charge filed by Respondent's Inquiry Tribunal on May 21, 1980. (Petition, Appendix 3). The charges were ordered consolidated by

the Inquiry Tribunal. Petitioner filed answers to both charges.

The Inquiry Tribunal determined that issues of fact had been raised and a Trial Commissioner was appointed on August 7, 1980. An evidentiary hearing was held on January 15, 1981. Petitioner was present but did not testify at the hearing nor did he present any witnesses. The Trial Commissioner filed his report on March 18, 1981, finding Petitioner guilty under all charges.

The parties filed briefs with Respondent's Board of Governors. On May 13, 1981, the Board, by a vote of 15-0, with one member abstaining, found Petitioner guilty as charged and recommended to the Supreme Court that he be suspended from the practice of law for two years. Petitioner timely filed a Notice for Review supported by a brief and Respondent filed its brief in response.

The Supreme Court of Kentucky found Petitioner guilty as charged on all counts in *Kentucky Bar Association v. Cohen*, Ky., 625 S.W. 2d 573 (1981). (Petition, Appendix 1). The Supreme Court of Kentucky denied Petitioner's Petition for Rehearing on January 12, 1981, but ordered a Stay of Enforcement of the Judgment pending the timely filing of Petitioner's Petition for Writ of Certiorari in this Court. On April 8, 1982, Petitioner filed a Motion for Stay with an Associate Justice which was denied by this Court on the same day. An Application for Continuation of the Stay was then presented to another Associate Justice and was denied by this Court on April 19, 1982.

At no time has Petitioner alleged that Respondent failed to comply completely with the provisions of Rule 3

of the Supreme Court of Kentucky governing disciplinary proceedings.

REASONS FOR DENYING THE PETITION

The issues raised by Petitioner will be answered briefly after a short consideration of the general issues in the case.

I

THE DECISION BELOW WAS BASED ON AN ADEQUATE AND INDEPENDENT NON-FEDERAL GROUND

The constitutional issues raised by Petitioner in his Petition for Rehearing before the Supreme Court of Kentucky were whether or not the disciplinary proceedings by the Kentucky Bar Association and Supreme Court were conducted in such a way as to deny him rights of procedural and substantive due process and equal protection of the law under the Fourteenth Amendment of the United States Constitution. In addition, Petitioner alleged that evidence did not support the findings of the Board of Governors nor the Court concerning Petitioner taking an attorney's fee before the filing fee was paid in a routine bankruptcy case. The Court in its Per Curiam Opinion clearly based its decision on independent and substantial non-federal grounds.

Under the Rules of the Supreme Court of Kentucky and Kentucky case law, the findings of the Trial Commissioner and the Board of Governors were only advisory and the Court itself made an independent examination of

the factual and legal issues involved and confirmed the Trial Commissioner's and the Board's advisory findings. The Court itself was the only body which could impose any discipline and there was no denial of procedural due process. All rules of the Court were strictly followed at all stages of the proceeding. Pursuant to the provisions of the Kentucky Constitution, Section 116, stating in part, ". . . The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar.", it would be unconstitutional for the court to delegate its fact finding duty in bar disciplinary cases to any other entity.

The State Court has stated in *Kentucky Bar Association v. Stivers*, Ky., 475 S.W. 2d 900, cert. denied, 406 U.S. 968 (1972), in part:

> "The report and recommendations of the trial committee are only advisory to the Board of Governors, as are the Board's recommendations to this court. RCA 3.400, 3.420 (now RCA 3.360, 3.370). This means, of course, that in the end this court must be judge of the factual issues and of the final action to be taken. The role of fact-finder is neither welcome nor comfortable to an appellate court, but obviously we have saddled it upon ourselves by our own rules for this type of proceeding." (p. 904)
>
> * * *
>
> "But it must be recognized that its action is nothing more than advisory to this Court." (p. 904)
>
> * * *
>
> "In a matter as serious as this, the advisory weight of the Board's action can be little more than hortatory, which means in simple English, that the members of this Court are going to exercise their own judgment anyway." (p. 904)

It is equally clear that the Court did exercise its own judgment after a review of the record. Its judgment concerning factual issues agreed with the recommendations of the Board and the Trial Commissioner.

The constitutional issues raised by Petitioner were answered by the Court through the interpretation of Kentucky law and the Rules of the Supreme Court of Kentucky. Its factual findings are based on the entire record. The Court found Petitioner's conduct so reprehensible as to bring the bench and bar into disrepute and the discipline recommended by the Board was adopted. The Court further stated in its opinion that Petitioner's argument of unconstitutional vagueness has been consistently rejected by the Court and required no further comment. The Court did not need to elaborate further in its concise and clear opinion. There were no federal issues to be decided since the sole basis on which to determine the validity of the Petitioner's constitutional arguments rested on the proper interpretation of Kentucky law and standards of conduct set by the Supreme Court of Kentucky.

The facts in this case clearly show Petitioner to be dishonest and unfit to practice law. The public must be protected from such a practitioner.

The Petitioner has requested this Court to grant a Petition for Writ of Certiorari, and yet a close examination of the issues involved and careful reading of the opinion rendered by the Supreme Court of Kentucky clearly reveals that the results reached in this case by the Court were based upon a clear and careful analysis of Kentucky substantive law, the Rules of the Supreme Court of Kentucky and the record in the case as a whole. Certiorari certainly should not be granted merely to

review the findings of fact made independently by the Supreme Court of Kentucky and the sound standard of conduct applied to those facts by the Court.

This Court has made clear the strong interest of state courts in disciplining their members of the bar in the case of *Goldfarb v. Virginia State Bar, et al.*, 95 S.Ct. 2004 (1975) at p. 2016, when it stated:

> "We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety and other valid interests, they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.' United States v. Oregon State Medical Society, 343 U.S. 326, 336, 72 S.Ct. 690, 697, 96 L.Ed. 978 (1952), see also Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 611-613, 55 S.Ct. 570, 571-572, 79 L.Ed. 1086 (1935). The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts'. See Sperry v. Florida, 373 U.S. 379, 383, 83 S.Ct. 1322, 1325, 10 L.Ed. 2d 428 (1963); Cohen v. Hurley, 366 U.S. 117, 123-124, 81 S.Ct. 954, 958, 6 L.Ed. 2d 156 (1962); Law Students Research Council v. Wadmand, 401 U.S. 154, 157, 91 S.Ct. 720, 723, 27 L.Ed. 2d 749 (1971). In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act, we intend no

diminution of the authority of the State to regulate its professions."

The mission and purpose of Respondent as an agency of the Supreme Court of Kentucky is clearly stated by the Court in SCR 3.025 providing:

> "The mission and purpose of the association is to maintain a proper discipline of the members of the bar in accordance with these rules and with the principles of the legal profession as a public calling, to initiate and supervise, with the appoval of the court, appropriate means to insure a continuing high standard of professional competence on the part of the members of the bar, and to bear a substantial and continuing responsibility for promoting the efficiency and improvement of the judicial system."

Petitioner seeks to relitigate his case on factual issues before this Court. Again it will be noted that Petitioner did not testify at the evidentiary hearing. Here again, Petitioner has urged as a reason for granting certiorari an issue which is not valid. The factual determination by the lower court and the weight and credibility accorded to the evidence are not properly reviewable.

II

THE DISCIPLINARY POCEEDINGS OF THE SUPREME COURT OF KENTUCKY AND THE KENTUCKY BAR ASSOCIATION, AN AGENCY OF THE COURT, DID NOT DENY PETITIONER PROCEDURAL DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Petitioner states on page 7 of his Petition that *In Re Ruffalo*, 390 U.S. 544, 551 (1968), holds that state disciplinary proceedings are "of a quasi-criminal nature." The *Ruffalo* case dealt with a federal disbarment proceeding. This Court had before it the state proceeding but denied the Petition for Writ of Certiorari. *Ruffalo v. Mahoning County Bar Association*, Ohio 199 N.E. 2d 396, cert. denied, 379 U.S. 931 (1964). While this Court has never, to respondent's knowledge, held that a state disciplinary proceeding lacks due process protections, it is certainly clear this case raises no important constitutional issue warranting review by this Court in setting a precedent to grant review of unified state bar disciplinary procedures on a procedural due process argument.

Indeed, the United States Court of Appeals for the Sixth Circuit reviewed the precise issues Petitioner raises under Rule 3 of the Supreme Court of Kentucky (formerly Court of Appeals of Kentucky) and rejected due process arguments stating:

> (3,4) "There are, as appellants assert, some unusual features in the Kentucky procedure. The State Bar Board of Governors' review of a complaint

(Step 2) is entirely in camera excluding the respondents who had been complained against. And the recommendations of the Trial Committee (Step 1) and those of the Board of Governors (Step 2) are entirely advisory. Kentucky's highest court has interpreted its rule as reserving to itself final decision as to both guilt and penalty after its review of the record made before the Trial Committee and the recommendations of the Trial Committee and the Board of Governors. *Kentucky State Bar Association v. Stivers*, 475 S.W. 2d 900 (Ky. Ct. App. 1972). Part 3 of the Rules of the Kentucky Court of Appeals provides a full hearing on written charges, with rights of confrontation and counsel before the Trial Committee. There is no allegation that those rights were not made available to appellants. The Court of Appeals decisions were based upon the full written record made before the Trial Committee and after full hearing before the Court of Appeals itself. The panel of this court which decided the *Taylor* case was, we feel, eminently correct in rejecting federal due process attacks upon KRS #30.170 (1975) and Part 3 of the Rules of the Kentucky Court of Appeals." *Getty v. Reed*, 547 F. 2d 771, CA 6 (1977).

Petitioner cites on pages 5 and 9 of his Petition as a compelling reason for granting the Writ the need for an early understanding about the process permitted for disciplining lawyers in connection with the new Code of Professional Responsibility being considered by the American Bar Association. Petitioner obviously is confused since the American Bar Association is currently studying proposed Model Rules of Professional Conduct which deals solely with substantive standards of conduct.

The American Bar Association in February, 1979, adopted Standards for Lawyer Disciplinary and Disability Proceedings (hereinafter referred to as ABA-SLD) which deals with desirable procedural requirements. Rule 3 of the Supreme Court of Kentucky is in compliance with nearly all standards and Respondent believes it has improved on those provisions contained in the Standards in which it is not in compliance.

It is interesting to note that ABA-SLD Standard 8.48 states (with Commentary):

> "8.48 *Review by Court.* In all cases before it, the court should review the record of the proceeding and the report of the board prior to disposing of the matter.
>
> COMMENTARY
>
> The report and recommendations of the Board is advisory only. The court may modify the findings and may increase or decrease the discipline recommended...."

This review procedure by the Supreme Court of Kentucky as stated in SCR 3.370 (7), (8), is in complete compliance with Standard 8.48. Kentucky's disciplinary rules relating to procedural due process are sustained by the tests of *Willíner v. Committee on Character*, 373 U.S. 96 (1963); *Schware v. Board of Bar Examiners*, 353 U.S. 232; and *Koningsberg v. State Board of California*, 353 U.S. 252. Clearly, the Supreme Court of Kentucky considers all cases in which charges are filed (the Board has no power of dismissal or private reprimand) and hears those charges on the record and briefs arising from a full due process evidentiary hearing without hearing the evidence in person and seeing and hearing Petitioner in

person. In this case, the Trial Commissioner, the Board and the Court all three found Petitioner guilty as charged with the facts being proven by substantial evidence as required by SCR 3.330. Petitioner's argument on this point is without foundation in fact or law.

Likewise, Rule 16 (B) (1) of the American Bar Association Model Rules for Federal Agency Discipline (1982) provides, in part, that in formal proceedings the court shall assign magistrates to conduct formal hearings and after hearing the magistrate shall render an opinion based on findings of fact, rulings of law, and recommendation for disposition. The court then reviews the record of the proceeding and the report of the magistrate. The Commentary to this rule states that although the report and recommendation of the magistrate is advisory only, his factual determinations should not be upset if they are supported by substantial evidence. In this case, the Court concurred with the findings of the Trial Commissioner and the Board. It is clear to Respondent that this Court's Rule 8 - Disbarment, envisions similar proceedings because of the unnecessary proceeding Petitioner proposes of having this Court hear, in person, all the evidence produced in its disbarment proceedings.

It is well settled that disciplinary proceedings through the Kentucky Bar Association are civil in nature and are neither criminal nor quasi-criminal in nature. *Commonwealth ex rel. Ward v. Harrington*, Ky., 267 Ky. 677, 103 S.W. 2d 117 (1937); *Louisville Bar Association v. Hubbard*, Ky., 282 Ky. 734, 139 S.W. 2d 773 (1940); *Kentucky Bar Association v. Signer*, Ky., 558, S.W. 2d 582 (1977). Disciplinary proceedings are fact finding inquiries into what may constitute unethical conduct.

Signer, supra; In Re Gilbert, Ky., 274 Ky. 187, 118 S.W. 2d 535 (1938); *In Re Stump,* Ky., 272 Ky. 593, 114 S.W. 2d 1094 (1938).

In the case of *In Re Edge,* Ky., 282 S.W. 2d 830 (1955), the Court held that hearings in bar disciplinary proceedings may be had on depositions because disciplinary proceedings are civil in nature.

Rules 52.01 and 53 of the Kentucky Rules of Civil Procedure provide that circuit judges may appoint commissioners to receive evidence and to conduct hearings in various civil matters. The commissioners may file a report with the circuit judges containing advisory findings of fact and the circuit judges are free to accept or reject the commissioners' reports. The use of commissioners in this manner is necessary and essential in assisting the court to expeditiously and efficiently decide cases.

The rights of a Petitioner are clearly stated in SCR 3.300.

Next Petitioner argues that a lawyer must be told the precise Canon of Ethics or Disciplinary Rule the lawyer is alleged to have violated or the Fourteenth Amendment to the Constitution of the United States has been violated. The Supreme Court of Kentucky has adopted SCR 3.130 stating, in part:

> Rule 3.130 ABA Codes of Professional Responsibility and Judicial Conduct Recognized As Authority
>
> "(1) Except for ethical considerations and disciplinary rules in conflict with Rule 3.135, the court recognizes and accepts the principles embodied in the American Bar Association's Code of Professional Responsibility as a sound statement of the standards of professional conduct required of mem-

> bers of the bar, and the inquiry tribunal may cause to be tried all charges brought under this code as well as charges for other unprofessional or unethical conduct tending to bring the bench and bar into disrepute."

The provisions of SCR 3.190 relating to the contents of a charge stated below have been strictly followed:

> "If the tribunal determines, by a majority vote, that a charge should be filed, it shall prepare such charge stating the name and present, or last known, address of the attorney and facts alleged to constitute unprofessional conduct. The charge shall be signed by a member of the tribunal and filed in the office of the director."

In the briefs in the state court proceeding, the provisions of the American Bar Association Code of Professional Responsibility set forth in DR 1-102 (A) (4) were argued. DR 1-102 (A) (4) provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. The Supreme Court of Kentucky quickly dismissed Petitioner's argument of unconstitutional because of vagueness because of the well settled state of Kentucky law. Each charge filed against Petitioner stated, "...(C)omplainant charges that such actions by respondent constitute unethical and unprofessional conduct tending to bring the bench and bar into disrepute . . . .". With respect to a similar phrase, namely for the discipline of judges "for good cause" the Supreme Court of Kentucky has stated that this standard is neither vague nor ambiguous as a matter of state law. *Nicholson v. Judicial Retirement and Removal Commission,* Ky., 562 S.W. 2d 306, Part I (1978). In the

Nicholson case the Court held:

> "Such a standard is not so vague as to violate due process requirements. Although the specific acts of misconduct encompassed within the phrase are numerous, ample guidelines for the determination of proper conduct may be found in the ethical standards applicable to lawyers and judges adopted by national and state bar associations and in the moral standards exacted of judicial officers by the public." *Nicholson, supra* at pp. 308-309.

III

THE DECISION BELOW IS CORRECT AND THERE ARE NOT JUSTIFIABLE REASONS FOR GRANTING THE WRIT

The opinion of the Supreme Court of Kentucky, concurred in by all the Justices, is based soundly on facts in the record, briefs and evidence before it. The Court considered all defenses offered by Petitioner. The Court stated, in particular, that the conduct of Petitioner consisting of the falsification of depositions is so reprehensible as to bring the bench and bar into disrepute causing his suspension from practice for two years. The Court applied a clear standard of the facts and stated its grave effect on the public image of the bench and bar.

Petitioner seeks to relitigate his case on factual issues before this Court. Petitioner did not testify at the evidentiary hearing and presented no witnesses in his behalf. There was no oversight on the part of the court. The factual determination by the lower court and the weight and credibility accorded to the evidence are not properly reviewable especially where the Court, directly in its

opinion, reviewed the charges and the evidence on which discipline was given.

Rule 17 of this Court provides special and important reasons for granting a Petition for Writ of Certiorari providing, in part:

> "(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

It is clear and obvious that Petitioner under these guidelines has stated no reasons whatsoever for granting the Petition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

LESLIE G. WHITMER, DIRECTOR-COUNSEL
MICHAEL M. HOOPER, ASSISTANT DIRECTOR
Kentucky Bar Association
West Main at Kentucky River
(502) 564-3795
COUNSEL FOR PETITIONER

CERTIFICATION

It is certified that three (3) copies of this Brief for Respondent in Opposition and the attached Appendix were mailed by first class mail, postage prepaid, this 4th day of May, 1982, to Honorable Henry A. Triplett, 231 South Fifth Street, Third Floor, Louisville, Kentucky 40202, Counsel for Petitioner.

LESLIE G. WHITMER

Appendix

APPENDIX I

(Filed July 7, 1980)

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION .....COMPLAINANT

V. **CHARGE**

BENHARDT S. COHEN .....RESPONDENT

* * * *

Comes now the Kentucky Bar Association, by and through its Inquiry Tribunal, and states that Benhardt S. Cohen, whose last known address is 310 West Liberty Street, Suite 715, Louisville, Kentucky 40202, a member of said association, did engage in the following unethical and unprofessional conduct:

I

In or about June, July, August and September, 1979, respondent caused to be prepared and filed petitions for bankruptcy in the Bankruptcy Court for the United States District Court of the Western District of Kentucky at Louisville on behalf of the following persons:

1. John M. Hagerdash	BK 79-01188
2. Dennis Clayton	BK 79-01227
3. Myra Dunlap	BK 79-01282
4. Charles D. Casey	BK 79-01283
5. Kerry A. Brooks	BK 79-01284

6.	Terry Royce Brooks	BK 79-01285
7.	Gene McGuffin	BK 79-01299
8.	Laura McGuffin	BK 79-01300
9.	Lawrence Wright	BK 79-01301
10.	Betty Jean Wright	BK 79-01302
11.	William Fitzgerald	BK 79-01303
12.	Margaret Fitzgerald	BK 79-01304
13.	Margaret Jane Corder	BK 79-01305
14.	Lex Corder	BK 79-01306
15.	Fineous Riggs	BK 79-01307
16.	Brenda Riggs	BK 79-01308
17.	Ronald Allen Raisor	BK 79-01438
18.	Judith Alane Raisor	BK 79-01439
19.	Samuel Bragg Judd	BK 79-01440
20.	Eulas D. Meredith	BK 79-01441
21.	Arthur Phillip Jones	BK 79-01480
22.	Lola M. Jones	BK 79-01481
23.	Jessie N. Preston	BK 79-01482
24.	David Triplett	BK 79-01483
25.	Essie Triplett	BK 79-01484
26.	Leslie Grinage	BK 79-01566
27.	Gary Wayne Baucom	BK 79-01567
28.	Hattie Faye Baucom	BK 79-01568
29.	Jackie Monroe Allen	BK 79-01612
30.	Charles E. Hutchinson	BK 79-01613
31.	Melinda Hutchinson	BK 79-01614
32.	William A. James	BK 79-01615
33.	Susan M. James	BK 79-01616
34.	James M. Rowcliff, Jr.	BK 79-01617
35.	Deborah G. Rowcliff	BK 79-01618
36.	Michael Reynolds	BK 79-01619
37.	Nancy D. Reynolds	BK 79-01620
38.	Charles Thaxton	BK 79-01691
39.	Carolyn P. Thaxton	BK 79-01692

40. Judy E. Rash	BK 79-01693
41. Joseph Edward Murphy	BK 79-01769
42. Pauline D. Murphy	BK 79-01770
43. James R. Miller	BK 79-01836
44. Phyllis D. Miller	BK 79-01837
45. Gary O. Reesor	BK 79-01838
46. Patricia Sue Reesor	BK 79-01839
47. Jerry Leo Harris	BK 79-01840
48. Tyler W. Briggs, Jr.	BK 79-01890
49. Danny L. Wilbur	BK 79-01969
50. Angela Wilbur	BK 79-01970
51. Danny Byers	BK 79-01971
52. Marjorie Byers	BK 79-01972
53. Margaret T. James	BK 79-01973
54. Mary J. Sewell	BK 79-01974
55. Debra Payne	BK 79-01975
56. Charles Montgomery	BK 79-02021
57. Cinda White	BK 79-02070
58. Verna F. Greenwell	BK 79-02071

In each of the above listed cases, respondent was paid an attorney's fee by the petitioners prior to the payment of any filing fees to the Clerk of the Bankruptcy Court.

Rule 107 (B) (3) of the Rules of Bankruptcy expressly provides that the filing fees must be paid to the Clerk of the court before the person who is petitioning the court for bankruptcy may pay his attorney for services rendered in connection with the bankruptcy case. Respondent intentionally or habitually violated Rule 107 (b) (3) of the Rules of Bankruptcy despite the fact that Bankruptcy Judge Merritt S. Deitz, Jr. cited Rule 107 (b) (3) to respondent from the bench in open court on or about the dates of July 10, 1979, July 24, 1979, August 7, 1979,

August 21, 1979, September 18, 1979 and October 2, 1979.

II

Within the same facts and circumstances as stated in Count I above, respondent made false and misleading written statements to the Bankruptcy Court of the United States District Court for the Western District of Kentucky in three separate instances, to wit:

1. On or about September 11, 1979, respondent caused to be prepared and filed with the Clerk of the Bankruptcy Court a petition for bankruptcy on behalf of Danny L. Wilbur, BK 79-01969, and Angela Wilbur, BK 79-01970. As part of said bankruptcy petition, respondent caused to be prepared and filed a document captioned "STATEMENT OF ATTORNEY FOR BANKRUPT" in which respondent falsely stated and misrepresented to the court that his clients, Danny Wilbur and Angela Wilbur, had paid respondent the sum of $50 as an attorney's fee and that his clients had agreed to pay him in the future the additional sum of $100 constituting the balance of respondent's attorney's fee. A true and correct copy of said statement is appended hereto, made a part hereof, and marked as Exhibit A. Said written statement by respondent was false and misleading in that prior to the filing of the bankruptcy petition with the court on September 11, 1979, Danny Wilbur and Angela Wilbur had paid respondent an attorney's fee in the amount of $150.

2. On or about September 11, 1979, respondent caused to be prepared and filed with the Clerk of the Bankruptcy Court a petition for bankruptcy on behalf of

Margaret T. James, BK 79-01973. As part of said bankruptcy petition respondent caused to be prepared and filed a document captioned "STATEMENT OF ATTORNEY FOR BANKRUPT" in which respondent falsely stated and misrepresented to the court that his client, Margaret James, had paid respondent the sum of $50 as an attorney's fee and that his client had agreed to pay him in the future the additional sum of $75 constituting the balance of respondent's attorney's fee. A true and correct copy of said Statement of Attorney for Bankrupt is appended hereto, made a part hereof and marked as Exhibit B. Said written statement by respondent was false and misleading in that prior to the filing of the bankruptcy petition with the court on September 11, 1979, Margaret James had paid respondent an attorney's fee in the amount of $125.

3. On or about September 18, 1979, respondent caused to be prepared and filed with the Clerk of the Bankruptcy Court a petition for bankruptcy on behalf of Debra Payne, BK 79-01975. As part of said bankruptcy petition respondent caused to be prepared and filed a document captioned "STATEMENT OF ATTORNEY FOR BANKRUPT" in which respondent falsely stated and misrepresented to the court that his client, Debra Payne, had paid respondent the sum of $50 as an attorney's fee and that his client had agreed to pay him in the future the additional sum of $50 constituting the balance of respondent's attorney's fee. A true and correct copy of said Statement of Attorney for Bankrupt is appended hereto, made a part hereof and marked as Exhibit C. Said written statement by respondent was false and misleading in that prior to the filing of the bankruptcy petition with the court on September 18, 1979,

Debra Payne had paid respondent an attorney's fee in the amount of $100.

WHEREFORE, Complainant charges that such actions by respondent constitute unethical and unprofessional conduct tending to bring the bench and bar into disrepute; and that discipline of an appropriate degree should be administered to respondent in accordance with SCR 3.370 and SCR 3.380.

KENTUCKY BAR ASSOCIATION

s/ _____
WILLIAM P. DONAN, CHAIRMAN
INQUIRY TRIBUNAL

ATTEST:

s/ _____
LESLIE G. WHITMER, DIRECTOR
KENTUCKY BAR ASSOCIATION